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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. CLIFTON L. LEE, Defendant and Appellant.	B213020 (Los Angeles County Super. Ct. No. BA343308)

APPEAL from a judgment of the Superior Court of Los Angeles County, Eric Labowitz, Judge. Affirmed.

Johanna R. Pirko, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

Clifton L. Lee appeals from his conviction by jury trial of assault with a deadly weapon. His only contention on appeal is that the trial court erred in denying his requests to replace his retained counsel and for a continuance to obtain new representation. We find no error and affirm.

FACTUAL AND PROCEDURAL SUMMARY

Appellant was arrested and charged with assaulting a fellow resident of a single room occupancy hotel. (Pen. Code, § 245, subd. (a).) A serious felony enhancement for inflicting great bodily injury on the victim also was charged. (Pen. Code, §§ 12022.7, subd. (a), 1192.7, subd. (c)(8).)

Before jury selection commenced on the first day of trial, appellant requested a *Marsden*[1] hearing to discharge his attorney. Counsel for appellant indicated a *Marsden* hearing was inappropriate because he was retained rather than appointed. The trial court agreed, denied the request for a hearing, and selected a jury. Appellant made no further comment regarding his attorney that day.

The next morning, outside the presence of the jury and before opening statements were made, the court told appellant it had been informed that he did not want to dress for trial that day. Appellant confirmed this and said: "Also I'm not going to retain my counsel any longer either." The court said: "Well, we're right in the middle of a jury trial. Do you have another counsel to take over?" Appellant replied "No." The trial court asked: "What is your plan?" Appellant said: "Probably to continue it." The court told appellant this was not a plan. Appellant said: "Well, my plan was to have other witnesses on that my attorney didn't get, so I wrote out a note of a list of witnesses, and he emphatically refused to get those witnesses." The court repeated that the issue was appellant's plan for trial that day. Appellant said: "Well, I have no counsel. I have no attorney." The court then questioned why appellant was insisting on appearing for trial in

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1 *People v. Marsden* (1970) 2 Cal.3d 118.)

a jail uniform and discharging his attorney when a plea offer had been made by the prosecution.

Appellant expressed his view that there had been evidence tampering. He said, "I paid for the attorney to submit this evidence in, and he didn't; and to call the witnesses, and he emphatically said no." The court explained: "Well, you hired a professional who knows how to conduct a trial and knows what type of evidence can be admitted and what is relevant to your case. You're not the attorney." Appellant interrupted, saying, "He can't help me." The court continued: "And if the attorney's looking into the case and what evidence can be presented, the attorney has come up with a plan for your defense. You may not agree with it, but it may be that you are not aware of how evidence is introduced in court." Appellant responded: "With no witnesses? That's not a defense."

The court asked counsel for appellant whether he had any comment. Counsel said that from the beginning of his representation, he had neither encouraged appellant to take a plea offer or to go to trial. He simply told appellant he had a good case, the offers were respectable, and that he supported any decision appellant made. Appellant interjected: "There goes the witnesses." Counsel for appellant confirmed that appellant had asked for certain witnesses or for a certain witness to be subpoenaed, and "I'm not going to do it." Counsel for appellant said he was ready to proceed with trial.

The court told appellant: "Mr. Lee, we are going to go ahead with the trial. Either you are going to have an attorney step in and represent you or you're going to represent yourself." Appellant said, "I don't have a witness—I don't have the evidence or the witnesses." The court responded: "I'm telling you, we're going forward with the case today."

The trial proceeded and appellant was found guilty of assault with a deadly weapon but the special allegation of great bodily injury was found not to be true. Imposition of sentence was suspended and appellant was placed on formal probation for three years and ordered to serve 270 days in the county jail with credit for 168 days for time served. This timely appeal followed.

DISCUSSION

Appellant argues that automatic reversal is required because the trial court failed to conduct the balancing test applicable when a defendant seeks to replace retained counsel.

"[T]he United States Supreme Court has . . . reiterated that an element of a defendant's right to counsel 'is the right of a defendant who does not require appointed counsel to choose who will represent him. [Citations.]' (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140.) A criminal defendant has a qualified right to retain counsel of his choice, and the trial court can deny a defendant's timely request to substitute counsel only if it '"will result in significant prejudice to the defendant."' (*People v. Gzikowski* (1982) 32 Cal.3d 580, 587.) 'The right to effective assistance of counsel [citations] encompasses the right to retain counsel of one's choice. [Citation.] Though entitlement to representation by a particular attorney is not absolute [citation], "the state should keep to a necessary minimum its interference with the individual's desire to defend himself in whatever manner he deems best, using any legitimate means within his resources—and . . . that desire can constitutionally be forced to yield only when it will result in significant prejudice to the defendant himself or in a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case" [citation].' (*Id.* at pp. 586-587.)" (*People v. Ramirez* (2006) 39 Cal.4th 398, 422.)

"The right of a nonindigent criminal defendant to discharge his retained attorney, with or without cause, has long been recognized in this state [citations] . . . ." (*People v. Oritz* (1990) 51 Cal.3d 975, 983.) But "[a] nonindigent defendant's right to discharge his retained counsel . . . is not absolute. The trial court, in its discretion, may deny such a motion if discharge will result in 'significant prejudice' to the defendant [citation] or if it is not timely, i.e. if it will result in 'disruption of the orderly processes of justice' [citations]." (*Ibid.*) The court must balance the defendant's Sixth Amendment right to counsel against "'the interest in proceeding with prosecutions on an orderly and expeditious basis, taking into account the practical difficulties of "assembling the witnesses, lawyers, and jurors at the same place at the same time."'" (*Id.* at p. 984.) The

Ortiz court admonished trial courts to exercise discretion reasonably: "'a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality.' [Citation.]" (*People v. Ortiz*, *supra*, 51 Cal.3d at p. 984.)

In contrast to the deferential abuse of discretion review of denial of an indigent defendant's *Marsden* motion, "reversal is automatic when a defendant has been deprived of his right to discharge retained counsel and defend with counsel of his choice." (*People v. Lara* (2001) 86 Cal.App.4th 139, 154.)

Appellant argues the trial court did not consider how a continuance to allow him to retain new counsel would disrupt the proceedings, although he acknowledges the trial court said the parties were in the middle of a jury trial. He also contends the court did not balance any purported disruption against his Sixth Amendment right to counsel of his choice as required by *People v. Ortiz*, *supra*, 51 Cal.3d at page 982. (See also *People v. Lara*, *supra*, 86 Cal.App.4th at p. 153.) He asserts the trial court actually applied the standard for removal of appointed counsel under *Marsden* by focusing on the conflict between himself and his attorney. In support of this contention, appellant cites the colloquy between himself and the judge, in which the judge responded to his complaint that his attorney refused to present certain witnesses and evidence at trial. The trial court said, "Well, you hired a professional who knows how to conduct a trial and knows what type of evidence can be admitted and what is relevant to your case. You're not the attorney. . . . You may not agree with it, but it may be that you are not aware of how evidence is introduced in court."

The *Marsden* test for replacement of appointed counsel is irrelevant to a request to discharge retained counsel, as appellant contends. (*People v. Keshishian* (2008) 162 Cal.App.4th 425, 429; citing *People v. Lara*, *supra*, 86 Cal.App.4th at p. 155 [*Marsden* hearing is inappropriate vehicle to consider complaints against retained counsel].)

As respondent points out, the trial court expressly recognized that appellant's initial request to replace his counsel did not implicate the *Marsden* analysis because the attorney was retained. The next morning, when appellant announced he was going to

discharge his attorney, court immediately noted, "[W]e're in the middle of a jury trial" and asked whether appellant had identified substitute counsel. When appellant said he had not, the court asked about his plan to replace his attorney. It was appellant who responded by volunteering information about a conflict with his attorney. The court repeated that the issue was appellant's plan for trial that day. When appellant said he had no attorney, the court mentioned appellant's insistence on appearing in his jail clothes and decision to discharge his attorney when the prosecution had made a plea offer.

This colloquy demonstrates that the trial court was focused on the relevant balancing test under *People v. Ortiz, supra*, 51 Cal.3d at pages 983-984: appellant's right to counsel of his choice versus the disruption any trial continuance would cause. We reject appellant's argument that the trial court erred by applying *Marsden* instead.

Appellant argues his request to discharge counsel was not unjustifiably dilatory and therefore should have been granted. Recognizing that a determination as to whether a continuance would cause an unreasonable disruption depends on the circumstances of each case (*People v. Lara, supra*, 86 Cal.App.4th at p. 152), appellant cites factors found relevant in California cases. One factor is whether the defendant acted arbitrarily and for purposes of delay in seeking to discharge counsel. (*People v. Munoz* (2006) 138 Cal.App.4th 860, 870.) In *Munoz*, the defendant waited until after the verdict to request to substitute retained counsel. He had made repeated and detailed requests for a new attorney which the Court of Appeal found reflected a "'genuine concern about the adequacy of his defense rather than any intent to delay'" the proceedings. (*Ibid.*, quoting *People v. Ortiz, supra*, 51 Cal.3d at p. 987.) The *Munoz* court found the record devoid "of even a suggestion defendant had an interest in delay, and, considering the fact the court *delayed the proceedings five weeks* after it denied the substitution request, it seems unlikely that appointing new counsel for defendant would have led to 'an unreasonable disruption of the orderly process of justice.' [Citation.]" (*Ibid.*) The case against Munoz was not complicated and the trial lasted two days. (*Munoz*, at p. 870.)

In contrast, here trial commenced immediately after appellant's request to retain new counsel was denied. In addition, appellant appeared for trial in his jail clothing, and

his comment about that was coupled with his request to change attorneys. When asked by the court about his plan, appellant said, "Probably to continue it [the trial]." A reasonable inference may be drawn from appellant's behavior that he was seeking to disrupt the proceedings.

Appellant attempts to distinguish *People v. Keshishian*, *supra*, 162 Cal.App.4th 425. In that case, on the day the matter was called for trial, the defendant told the court he had lost confidence in his retained attorney and was looking for a substitute. He asked for a continuance to retain new counsel. The case had been pending for two and a half years after numerous continuances were granted at requests by the defense. In addition, the prosecutor vigorously opposed a further continuance, citing the age of the case and problems with witnesses since the crime occurred six years earlier and had been delayed when the defendant fled the country.

We found the court applied the correct standard in "rejecting appellant's last-minute attempt to discharge counsel and delay the start of trial." (*People v. Keshishian*, *supra*, 162 Cal.App.4th at p. 429.) We noted that the appellant was given an opportunity to explain his reasons for seeking a substitution of counsel, and said only that he had lost confidence in his attorneys. Since the request to substitute attorneys was made on the day set for trial, we concluded "[a]n indefinite continuance would have been necessary, as appellant had neither identified nor retained new counsel. Witnesses whose appearances had already been scheduled would have been further inconvenienced by an indefinite delay." (*Ibid.*) We reasoned that the trial court is "'"within its discretion to deny a last-minute motion for continuance to secure new counsel."' [Citations.]" (*Ibid.*) The fact that defendant lost confidence in his experienced and fully prepared counsel did not constitute good cause for granting the continuance where the resulting delay would have disrupted the judicial process. (*Ibid.*)

Here, appellant waited until after the jury had been selected to inform the court that he wished to substitute new retained counsel. He had not made arrangements for the substitution, and a mistrial and continuance would have been required. These circumstances justified the ruling denying the request.

DISPOSITION

The judgment is affirmed.

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EPSTEIN, P.J.

We concur:

WILLHITE, J.

MANELLA, J.